

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**EYM KING OF MICHIGAN, LLC d/b/a.
BURGER KING**

Respondent

and

CASE 07-CA-118835

**MICHIGAN WORKERS ORGANIZING
COMMITTEE**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO
RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION**

Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Bldg.
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569
Direct Dial: (313) 226-3238
Fax: (313) 226-2090
Email: Robert. Drzyzga@nrlrb.gov

Counsel for the General Counsel, pursuant to Section 102.46 (h) of the Board's Rules and Regulations, respectfully submits the following Reply Brief to Respondent's Answer to Counsel for the General Counsel's Cross-Exceptions to the Decision of Administrative Law Judge Amchan.¹

I. Procedural History

On September 29, 2014, Administrative Law Judge Arthur Amchan issued his decision in the above matter. On October 27, 2014, Respondent filed a number of exceptions to the ALJ's Decision. On November 7, 2014, Counsel for the General Counsel filed an answering brief and cross exceptions. On November 24, 2014, Respondent filed an answering brief to Counsel for the General Counsel's cross exceptions. Counsel for the General Counsel responds to Respondent's Answering brief as follows:

II. Respondent's Answering Brief.

(a) Respondent's assertion that Counsel for the General Counsel waived the right to contest the revised confidentiality policy ignores the arguments Counsel for the General Counsel's articulated in his cross exceptions.

Respondent, on page 3 of its brief, asserts that Counsel for the General Counsel's brief makes no challenge to Respondent's current revised confidentiality policy, and Counsel for the General Counsel therefore waived any right to contest the revised confidentiality policy.

The Board's Rules and Regulations, Section 102.46 (b) (1) states in part:

¹ Throughout this brief the following references will be used:
Administrative Law Judge: ALJ
Administrative Law Judge Decision: ALJD
Transcript: Tr (followed by page number)
General Counsel Exhibit: GC (followed by exhibit number)
General Counsel Brief to ALJ: GC Br (followed by page number)
General Counsel Cross Exceptions: GC (followed by page number)
Respondent Answering Brief: RA (followed by page number)

“Each exception (i) shall set forth specifically the questions of procedure, fact, law or policy to which exception is taken; (ii) shall identify the part of the administrative law judge’s decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.”

The ALJ in error found that the “confidentiality rule,” without distinguishing between the original or revised rule, did not violate the Act. Indeed, the ALJ never analyzed or addressed the revised rule in his decision. (ALJD P 13, L 8-14)

Respondent further mischaracterizes the facts when it asserts that the cross exceptions make reference only to the contents of the original policy. (RA, P 3) As noted in Counsel for the General Counsel’s original brief, GC Br P 31-35, and cross exceptions, GC X, P 4-6, Counsel for the General Counsel argued that the original and revised rules were unlawful. Specifically, Counsel for the General Counsel’s argued in his original brief to the ALJ that:

“Assuming, arguendo, that Respondent republished its policy as it asserts in March 2014 (R Ex 56), which Counsel for the General Counsel does not concede, ***its revised policy is still unlawfully overbroad because it retained its provision prohibiting removal or copying of any Respondent records, reports, or documents without prior management approval in its original form.*** (R Ex 56, p 3).” (GC Br P 34-35)

There is no question that Respondent retained the same language regarding removal of documents in its revised policy (Compare GC Ex 2, p 19-20 to R Ex 56) Further, the only portion of the revised confidentiality rule contested by Counsel for the General Counsel was the last paragraph of Respondent’s revised rule. As noted in Counsel for the General Counsel’s

Cross-Exceptions:

“The rule also prohibits employees from speaking to ***anyone*** outside the company about company business, ***and from removing or making copies of documents of any kind without management approval.***” These restrictions would reasonably be interpreted by employees to prohibit employees from

discussing and providing information to union representatives regarding payroll documents, employee wage rates, names, phone numbers and addresses, disciplinary write-ups, work rule changes, schedule changes, meeting notices and/or participating and providing evidence in Board investigations. Cites omitted. (GC Exceptions P 6).

There is no question Counsel for the General Counsel challenged Respondent's revised confidentiality rule by arguing in his brief to the ALJ that it is overly broad, and reiterating the same argument in his cross-exceptions. The exception is reserved because the original brief and cross-exceptions raise issues of fact and law with respect to the ALJD, and in a concise manner, argues the rule's unlawfulness with appropriate references to the record and applicable case law.

Further, assuming *arguendo* that the revised confidentiality rule is found lawful, which Counsel for the General Counsel does not concede, there is no credible record evidence that the revised confidentiality rule was disseminated to employees, or that employees were informed that the revised rule does not implicate their Section 7 rights. As the ALJ correctly noted in addressing another unlawful rule:

“in order to cure its violation, Respondent would have been obligated, at a minimum, to clarify for its employees that they have a Section 7 right to discuss wages, hours and working conditions and that they will not be disciplined for erroneous statements which are not maliciously false. Moreover, the revocation of the overly broad rule in this case was not free from other illegal conduct.” (ALJD P 12, fn 10)

The ALJ further noted that “simply not including this rule in its March 2014 [revision] is insufficient to cure the violation created by including it in the original rules, *DaNite*, 356 NLRB No.124 (2011).” (ALJD P 13, Fn 12)

There is no credible record evidence that the handbook was revised and distributed to employees subsequent to Respondent's purported revision. Respondent's Operations Manager Vizcarra, who testified to this matter, was led by Respondent's counsel through this entire

sequence of questioning, hence, Vizcarra's testimony was not credible. (Tr 356-359, 366, 423, 507-508) ***Cowles Publishing Company***, 280 NLRB 903, 914 (1986) (testimony elicited through the use of leading questions impairs credibility) Further, Respondent's counsel asserts the unlawful rules were amended in response to the Union's filing of unfair labor practice charges, but could not establish that they were distributed to employees. (Tr 361) Finally, even if portions of the rule were revised and disseminated, the revised parts of the rule remain unlawful because there is no evidence that employees were informed that they have a Section 7 right to discuss wages, hours and working conditions under the revised rules.

(b) Respondent's assertion that the legality of its confidentiality rule is immaterial to the outcome of the case is without merit.

Respondent, on page 17 of its brief, asserts, in part, that Counsel for the General Counsel's Cross Exception C is erroneous because the legality of Respondent's confidentiality rule is immaterial to the outcome of the case.

Assuming that the confidentiality rule is unlawful, the written or oral promulgation of such would establish an independent 8(a)(1) violation. The record clearly establishes that Supervisor Eberhart read the rule aloud at a captive audience meeting. By doing so, Respondent republished its unlawful rule to employees. (Tr 219, 555; GC Ex 2, p 19-20) As the ALJ noted in his decision regarding the reading of the unlawful solicitation and loitering rule:

“However, I find that by reading Respondent's illegal loitering rule verbatim to the assembled employees, Pack violated Section 8(a)(1) of the Act apart from anything else she said” (ALJD P 13, L 33-34)

Similarly, Eberhart's reading of the unlawful confidentiality rule to employees violates Section 8(a)(1) of the Act. ***Cellco Partnership d/b/a Verizon Wireless***, 349 NLRB 640, 659 (2007) (for

the principle that the oral promulgation of an unlawful rule is an independent violation of Section 8(a)(1) of the Act).

III. CONCLUSION

For the reasons advanced above, Counsel for the General Counsel respectfully asks that all of Respondent's arguments be denied in their entirety, and that the relief requested in Counsel for the General Counsel's Complaint, Brief, Cross-Exceptions, and Reply Brief be granted in their entirety.

Respectfully submitted this 4th day of December 2014.

/s/Robert A. Drzyzga

Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Bldg.
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569

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CERTIFICATE OF SERVICE

I certify that on the 4th day of December 2014, I e-filed **COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** and served a copy electronically on the following parties of record:

VIA EMAIL:

John L Ross, Esq., Partner-In-Charge,
Labor & Employment Section
Thompson, Coe, Cousins & Irons, LLP
700 N. Pearl Street, 25th Floor
Dallas, TX 75201
Email: jross@thompsoncoe.com

Patrick J. Rorai, Esq.
McKnight, McClow, Canzano, Smith & Radtke, PC
400 Galleria Officentre, Suite 117
Southfield, MI 48034-2161
Email: prorai@michworklaw.com

/s/ Robert A. Drzyzga
Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300